

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision : 29th January, 2013

+ DEATH SENTENCE REF. 2/2012

STATE Petitioner

Through : Ms. Ritu Gauba, APP.

versus

KUMARI MUBIN FATIMA & ORS. Respondents

Through : Mr. Sumeet Verma, Adv. for
Gulbeg Ali.

Mr. Bhupesh Narula, Adv.
for Zulfikar Ali.

Mr. Ajay Verma with
Mr. M.L. Yadav, Ms.
Ananya Mitra and Mr.
Gaurav Bhattacharya, Advs.
for Mubin Fatima.

+ CRL.A. 474/2012

GULBEG ALI Appellant

Through : Mr. Sumeet Verma, Adv.

versus

STATE Respondent

Through : Ms. Ritu Gauba, APP.

+ CRL.A. 472/2012

ZULFIKAR ALI Appellant

Through : Mr. Bhupesh Narula, Adv.

versus

STATE Respondent

Through : Ms. Ritu Gauba, APP.

+ **CRL.A. 473/2012**

MUBIN FATIMA Appellant

Through Mr. Ajay Verma with
Mr. M.L. Yadav, Ms.
Ananya Mitra and Mr.
Gaurav Bhattacharya, Advs.

versus

STATE Respondent

Through : Ms. Ritu Gauba, APP.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J. (Oral)

1. By way of Death Sentence Reference No.2/2012, this court is required to consider the legality and validity of the judgment dated 17th March, 2012 whereby the respondents in Death Reference no.2/2012 have been found guilty for commission of offences under Section 302 read with Section 34 of the IPC as well as order of sentence dated 26th March, 2012 whereby they have all been sentenced to death penalty for commission of such offences as well as payment of fine of Rs.5,000/- each and in case of default, one month's rigorous imprisonment each.

2. The respondents have assailed the said judgment and said order of sentence by way of the criminal appeals being CrI.A.No.472/2012, Zulfikar Ali v. State; CrI.A.No.473/2012, Mubin Fatima v. State; and CrI.A.No.474/2012, Gulbeg Ali v. State. Inasmuch as the three appeals and the death reference arise out of the same judgment based upon the same record and raise similar questions of law and fact, we are taking them together for consideration.

So far as reference to parties is concerned, for the purposes of convenience, we are referring to the convicts as the respondents in the present judgment.

Scope of consideration in a case of confirmation of sentence

3. The principles which would govern the consideration by us of the impugned judgment as well as the sentence of death imposed by the learned trial court on the respondents are well settled. We may usefully refer the recent pronouncement of the Supreme Court placed by Ms. Ritu Gauba, learned APP before this court which is reported at **(2012) 9 SCC 320, Kunal Majumdar v. State of Rajasthan** wherein the Supreme Court noticed the applicable statutory provisions and laid down binding principles thus:-

“16. In a case for consideration for confirmation of death sentence Under Section 366 (1) Code of Criminal Procedure., the High Court is bound to examine the Reference with particular reference to the provisions contained in Sections 367 to 371 Code of Criminal Procedure. Under Section 367, Code of Criminal Procedure., when Reference is submitted

before the High Court, the High Court, if satisfied that a further enquiry should be made or additional evidence should be taken upon, any point bearing upon the guilt or innocence of the convict person, it can make such enquiry or take such evidence itself or direct it to be made or taken by the Court of Sessions. The ancillary powers as regards the presence of the accused in such circumstances have been provided under Sub-clauses (2) and (3) of Section 367, Code of Criminal Procedure. Under Section 368, while dealing with the Reference Under Section 366, it *inter alia* provides for confirmation of the sentence or pass any other sentence warranted by law or may annul the conviction itself and in its place convict the accused for any other offence of which the Court of Sessions might have convicted the accused or order for a new trial on the same or an amended charge. It may also acquit the accused person. Under Section 370, when such Reference is heard by Bench of Judges and if they are divided in their opinion, the case should be decided in the manner provided Under Section 392 as per which the case should be laid before another Judge of that Court who should deliver his opinion and the judgment or order should follow that opinion. Here again, under the proviso to Section 392, it is stipulated that if one of the Judges constituting the Bench or where the appeal is laid before another Judge, either of them, if so required, direct for rehearing of the appeal for a decision to be rendered by a larger Bench of Judges.

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18. We are, however, duty bound to state and record that in a Reference made Under Section 366 (1) Code of Criminal Procedure., there is no question of the High Court short-circuiting the process of Reference by merely relying upon any concession made by the counsel for the convict or that of counsel for the State. A duty is cast upon the High Court to examine the nature and the manner in which the offence was committed, the mens rea if any, of the culprit, the plight of the victim as noted by the trial Court, the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit vis-à-vis the public interest, the conduct of the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependants or the custodians of the victim. There should be very wide range of consideration to be made by the High Court dealing with the Reference in order to ensure that the ultimate outcome of the Reference would instill confidence in the minds of peace loving citizens and also achieve the object of acting as a deterrent for others from indulging in such crimes.”

4. The consideration by this court of the judgment and the sentence imposed by the learned trial judge would abide by the above principles.

5. As noticed above, three appeals filed by three convicts have also been placed before us. So far as scope of consideration by an appellate court in an appeal against the conviction is concerned, the

principles thereof have been laid down by the Supreme Court in a judgment which has been reported as back as in *AIR 1955 SC 807, Atley v. State of Uttar Pradesh* wherein the court held as follows:-

“5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417, Criminal P.C. came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, ‘Surajpal Singh v. The State’, ; Wilayat Khan v. State of Uttar pradesh’. In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.”

These well settled principles have guided our consideration.

Case of the prosecution

6. The instant case commences on an incident on the night intervening 21st/22nd October, 2009. The place of occurrence is cited as the First Floor of House No.B-22, Gali No.3, Chaman Park, Near Bhagirathi Vihar, Delhi-110094, a property constructed on a plot of 22 sqr.yrds.

Sub-Inspector Mukesh Kumar Jain (Draughtsman) who appeared as PW-8 inspected the spot which allegedly was the first floor (upper ground) of this property and prepared the scaled site plan (Ex.PW8/A). PW-8 has stated that the passage for going from one floor to another was only a bamboo ladder which was only about 50 cms wide. There was therefore, no permanent or fixed staircase even. The bamboo ladder going to the upper floors was kept inside the house itself.

7. Perusal of the site plan – Ex.PW-8/A would show that the property was one of a row of tenements built wall to wall with no

open space on any side. The properties were opening out on to the narrow gali itself.

8. It is undisputed that the said property was owned by Gulbeg Ali who was residing on the first floor (also referred to as the upper ground floor) with his daughters Mubin Fatima and Chand Kiran. The elder son of Gulbeg Ali, Sarfaraz was residing with his wife Shama Praveen (deceased) and their two children on the second floor. The ground floor was occupied by Gulbeg Ali's younger son Zulfikar Ali and his family.

9. It is the case of the prosecution that on the 26th of October 2009 (Ex.PW13/A), at about 3:07:43 hrs, the Delhi Police Control Room received information from the informant – 'Shama Devi' from the phone no.'9312668396' giving her address as R-73, Gali No.3, Brahmpuri, New Delhi-110053 that there was a 'quarrel' at Chaman Park, Gali No.3, B-22, Near Aksha Masjid. This information was recorded by PW-13 – Woman Ct. Vinod Kumari who has in the same report again noted that the incident related to a 'jhagra'.

10. The receipt of this information has been established in the testimony of PW-13 – Lady Ct. Vinod Kumari who filled-up this information into the computer and dispatched it to the wireless section wherefrom the information was transmitted to the PCR vehicles, the concerned police station, etc. The police control room record of the entire information regarding the occurrence in question was proved as Ex.PW13/A on record.

11. The testimony of PW-13 is corroborated by PW-14 – Head Constable Ravi Shankar Sharma who has stated that on the 22nd of October 2009, he was on duty as incharge of the PCR vehicle which was based at Pulia, Brij Puri, Near Bhagirath Vihar, Delhi. While on duty at about 3:10 am, PW-14 received information on his wireless sent from the control room to the effect that there was a quarrel at B-22, Near Aksha Masjid, Gali No.3, Chaman Park, Bhagirathi Vihar, Delhi. The witness has stated that he duly recorded an entry with regard to the receipt of this information and proceeded to the spot by PCR vehicle.

12. At the Police Station Gokulpuri, Delhi, on receipt of the said information of the quarrel at the said house being House No.B-22, Gali No.3, Chaman Park, Near Bhagirathi Vihar, Delhi-110094 from the police control room, DD No.40A was recorded at 3:10 am on the 22nd of October 2009 as Ex.PW12/A.

This information was given to PW-16 ASI Sona Ram on the mobile phone for taking appropriate action.

13. With regard to the situation at the spot, PW-14 HC Ravi Shankar Sharma, incharge of the PCR, has disclosed that at the spot, he found Gulbeg Ali, an old man was coming out of the house followed by a lady in burning condition. PW-14 helped extinguish the fire and put a blanket over the body of the said lady. PW-14 categorically states that Gulbeg Ali and his son Zulfikar Ali had helped him in extinguishing the fire.

As per PW-14, when he interrogated the said lady, she had replied that she was put on fire by her father-in-law, brother-in-law (dewar) and sister-in-law (nanad).

14. At this stage, it is necessary to notice other contemporaneous police documentation which has material bearing on the case. As per the Delhi police control room report (Ex.PW13/A), the police control room has recorded a report received from the PCR van at 03:27:57 hrs to the effect that '*lady ne khud ko aag laga rakhi hai Aag bujha di Laker GTB Hosp ja rahe hai jali avastha me baki halat baad me*' (which when translated reads as 'Lady has set herself alight. Fire has been extinguished. Being taken to GTB Hospital in burnt condition. Rest of the condition later').

15. PW-14 – HC Ravi Shankar Sharma further disclosed that, before reaching the spot, he had made a telephone call to the mobile phone of the informer Shama Praveen, which was mentioned in the information received at the control room. The informant Shama Praveen had told PW-14 that he should reach the spot soon as there was a quarrel at her house. PW-14 has categorically stated that when he made the call to the informer, the PCR van was only about 2 minutes away from the spot.

16. PW-14 – HC Ravi Shankar Sharma disclosed that not only was Shama Praveen taken to the Guru Teg Bahadur Hospital but Gulbeg Ali had also suffered burn injuries in the incident and was taken to the hospital by the same PCR van.

17. As per the MLC no.A/4964/09 (Ex.PW15/A) of deceased Shama Praveen, she reached the hospital at 4:00 am on the 22nd of

October 2009. The MLC was recorded by one Dr. Satish Chandra, a Jr. Resident in the emergency ward. The doctor has noted that CE examination of the patient showed that she had suffered 100% burns all over the body; that the patient was conscious and oriented though her pulse rate was high at 120 per minute. The doctor was unable to record the blood pressure of the patient because of extensive 'skin stiffness'. Given the condition of the patient, a reference was sent to the surgery ward. One elastic rope which was on the deceased was handed over to the duty constable. The MLC notes that the patient had given a history of burns by in-laws. A perusal of the MLC of the deceased (Ex.PW15/A) shows that the deceased was referred to the surgery ward (room no.149). There is no reference at all to the deceased having been referred to or sent to the Burns ward.

With regard to the initial treatment administered to the patient, it is noted that the patient was prescribed injection TT; injection voveran; oxygenated.

18. The prosecution has also proved as Ex.PW15/B, the MLC bearing no.C/4897/09 of Gulbeg Ali who was also taken to the hospital by PW-14 – HC Ravi Shankar Sharma and was medically examined at 4:20 am in the GTB Hospital. This MLC is also recorded by Dr. Satish Chandra, Jr. Resident who has noted that Gulbeg Ali had suffered 10% burns which involved both hands; left thigh; and left knee. The doctor had recommended that the patient be kept under observation in the hospital.

19. It now becomes necessary to examine the intervention of the investigating officer in the matter. PW-16 – ASI Sona Ram has stated that on 22nd October, 2009, he was on night emergency duty at the police station when at about 00:15 am, a copy of DD no.40A (Ex.PW12/A) was assigned to him to take action into the matter in connection with a quarrel at the aforesaid House No.B-22, Gali No.3, Chaman Park, Near Bhagirathi Vihar, Delhi-110094. PW-16 – ASI Sona Ram with Constable Sachin Yadav reached the spot where he learnt that the injured Shama Praveen had already been removed to GTB Hospital by the PCR officials. PW-16 inspected the spot on the first floor of room in the said house and noticing some incriminating evidence; he left Constable Sachin Yadav to guard the spot while he proceeded to the hospital. In the GTB Hospital at about 4:15 am, he collected the MLC of Shama Praveen when it came to his notice that according to the MLC, she was fit to make a statement. PW-16 has deposed that he informed the Executive Magistrate on the phone that the incident had taken place within seven years of marriage. It is in evidence that Shama Praveen was married to Sarfaraz – PW-3 in around the year 2003-04 and that they had two children from the marriage.

20. Reference at this stage may usefully be made to the deposition of PW-10 - Shri P.K. Sofat, Executive Magistrate, Seelampur, Delhi who claims to have arrived at the hospital at about 7:00 am. PW-10 has stated that he met the injured Shama Praveen, wife of Sarfaraz Hussain with the assistance of a police official whose name he could not remember. The witness states

that the injured had been declared fit to make a statement and that he recorded the statement (Ex.PW10/A) of the injured Shama Praveen in the burns ward at about 7:50 am. PW-10 further states that he obtained the right thumb impression of the injured at point 'A' on her statement. So far as the contents of the statement are concerned, the witness testified that *"whatsoever injured told to him, same was recorded in her statement word by word by him. The statement of injured is correct. I had read over the same to the injured"*.

21. PW-10 – Shri Sofat has further deposed that after going through the statement of the injured, he realized that action had to be taken against the accused persons and therefore, he made an endorsement addressed to the SHO, Police Station Gokulpuri to take action as per the law. The witness delivered the statement – Ex.PW10/A to a police official to hand over the same to the SHO and left the GTB Hospital.

22. It appears that Shama Praveen could not recover and was declared clinically dead at 2:20 am on the 23rd of October 2009 (Ex.PW16/E).

23. The PW-16 - ASI Sona Ram, the investigating officer informed the SDM about the death vide DD No.17A. Information was also given to the police station Gokulpuri which was recorded as DD No.27A at 3:50 am on the 23rd of October 2009 (Ex.PW7/A).

24. The SDM, Shri P.K. Sofat thereafter conducted inquest proceedings and sent the body for post-mortem examination. The post-mortem was conducted by Dr. Jyoti who was not available at the time of recording of evidence. The post-mortem report dated 23rd October, 2009 was proved on record as Ex.PW16/E1 wherein the doctor opined the cause of death as “*shock as a result of antemortem flame burn involving about 96% of the total body surface area*”. It is important to note that as per the death summary (Ex.PW16/E), the deceased was taken to the general surgery emergency on 22nd October, 2009.

25. Inasmuch as, the entire edifice of the prosecution case rests on the statement attributed to Shama Praveen claimed to have been recorded by PW-10 – Shri P.K. Sofat, the same deserves to be considered in extenso and reads as follows:-

“DDNo.40A

Dated **22.10.09**

PS Gokulpuri”

“Mein Shama Parveen patni Shri Sarfaraz Hussain nivasi makan no.22 B Gali No.3 Chaman Park Johri Pur Delhi umar 26 saal ye **bayan** karti hu ki mera **vivah** muslim reeti rivaz se panch baras pehle Delhi (Brahmpuri) me hua tha mere do bachche hain ek ladka aur ladki. Main apne sasural walon se alag dusri manzil par apne pati ke sath rehti hu ghar jaydaad ke bantware ke sambandh me mere sasur va dewar se jhagra hota rehta tha mere sasur mujhe aur mere **pati** ko property se bedakhil karna chahte the isi baat par pehle bhi kai baar jhagra hua hai **dinak** 21.10.2009 ko mere pati kaam par chale gaye the aur raat ko ghar par nahi the aur akele bachchon ke sath apne kamre me so rahi thi waqt kareeb 2.30 baje mera sasur Gulbeg Ali ya dewar Zulfikar Ali mujhe apne kamre me pehli manzil lay lastic ki rassi mere dewar ne mere gale me bandh di aur nanad Mubin Fatima ne mujhe pakar aur sasur ne mitti ka tel mujh par daalkar machis ki tilli jala **jaan se marne ki niyat** mujhe aag laga di meri maut ka zimmewar mera sasur dewar **evam** nanad **uprokt** honge.

Mein bayan apni marji se pure hosh hawaas evam bina kisi dabav ke diye hain. Bayan parkar sun liye hain. Bayan sahi hai.”
(Emphasis supplied)

Registration of FIR

26. According to PW-16 – ASI Sona Ram, at about 8:00 am, the statement of the injured person was delivered to him by the Executive Magistrate to take action into the matter as per law. The witness – PW-16 has stated that he made an endorsement (Ex.PW16/A) on the statement after registration of the FIR and sent the same with Constable Sachin Yadav to the police station at about 9:00 am. In this regard, our attention is drawn to the rukka recorded by PW-16 – ASI Sona Ram at about 9:00 am on the 22nd of October 2009 on the statement claimed to be recorded by PW-10 – Shri P.K. Sofat, Executive Magistrate disclosing commission of offences under Sections 307/34 of IPC. The rukka was sent by PW-16 to the police station through Constable Sachin Yadav. Based on this rukka, FIR No.320/09 was registered under Sections 307/34 of IPC. DD No.3A was recorded at 9:20 am with regard to the registration of the case.

Investigation

27. PW-16 – ASI Sona Ram states that he had made inquiries from Shama Praveen but he did not record what she told him.

28. So far as the investigation into the case is concerned, PW-16 – ASI Sona Ram has stated that he had taken one sealed parcel containing an elastic rope vide seizure memo – Ex.PW2/A which was produced by lady Constable Karamveer from the hospital. He

proceeded from the hospital to the spot where he met Sarfaraz, husband of the injured at the spot. PW-16 has proved the site plan of the place of occurrence which was Ex.PW3/B prepared in his presence which bears signatures of Sarfaraz as well as the police officer. PW-16 directed the photographer constable Tarun Kumar Sharma (PW-6) to take photographs. PW-16 – ASI Sona Ram and constable Tarun Kumar Sharma (PW-6) visited the spot between 5:00 am to 5:30 am and took the photographs (Ex.PW6/A1 to Ex.PW6/A11). The crime team which included Sub-Inspector A.S. Yadav inspected the crime scene and advised PW-16 to lift incriminating articles from the spot.

29. So far as the recoveries are concerned, PW-16 has deposed that vide recovery memo dated 22nd October, 2009 (Ex.PW16/B), he had seized burnt clothes of the injured; a match box of the make ‘ship’ containing two used match sticks; and an empty plastic bottle of two litres having a red lid from which smell of kerosene was coming. The witness deposed that he had also recorded the statements of Sub-Inspector A.S. Yadav and Constable Tarun.

30. The judgment dated 17th of March 2012 rests primarily on the finding that the accused persons had the motive for the crime on account of a property dispute. It has based the conviction on the finding that the deceased had made a voluntary and truthful declaration (Ex.PW10/A) recorded by PW-10 – Shri P.K. Sofat in a fit state of mind. The other statements attributed to the deceased on the fateful night have not been considered material by the learned trial judge. Both these findings have been staunchly

assailed by learned counsels for the convicts. We first take up for consideration the challenge to Ex.PW10/A.

Fitness of the deceased

31. Mr. Bhupesh Narula, learned counsel has urged that she was in a critical condition at the time of her admission at 4:00 am in the GTB Hospital. Her condition was only deteriorating and she expired on 23rd October, 2009 at 2:20 am. As per the death summary, she had suffered 96% thermal burns which included facial burns and respiratory burns with deep burns all over the body. Her condition with passage of time could not have improved and by 7:50 am when the SDM claims to have recorded her statement, she would have certainly be more critical than when she was admitted over four hours earlier when she was admitted to hospital.

32. Mr. Bhupesh Narula, learned counsel has also drawn our attention to the post-mortem report – Ex.PW16/E1 which recorded that her lungs were congested and ademotus.

33. In this regard, Mr. Ajay Verma, learned counsel has placed the relevant extract from Medical Jurisprudence and Toxicology by Cox wherein it is noticed that in the survivor of burns, there may be severe respiratory damage due to the inhalation of flame and smoke which damage the lining of the larynx, trachea bronchi and even deeper portion of the lung. This may itself lead to death from respiratory insufficiency but may also be followed by severe, sometimes fatal, respiratory infection. It is urged that in such burnt

condition the deceased would be really agitated as is evident from her high pulse rate.

34. Learned counsels for the respondents strongly challenge the fitness of the deceased to have made any dying declaration. It is pointed out that PW-10 had admittedly neither taken medical fitness of the deceased from any doctor nor verified the same in any manner. It is pointed out that Ex.PW10/A contains no evidence of her fitness.

35. Before dealing with this contention, we may touch upon the well settled principles on the issue. The tests which a statement attributed to a dead person has to satisfy before it is admissible in evidence as a dying declaration under Section 32 of Evidence Act are laid down in the landmark judgment of the Supreme Court in ***AIR 1958 SC 22 Khushal Rao vs. State of Bombay*** which holds the field. In this binding judicial pronouncement, the Supreme Court conducted a review of the relevant provisions of the Evidence Act as well as judicial precedents of the Supreme Court as well as High Courts in India and laid down the principles thus :-

“16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was

made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

(Underlining by us)

36. So far as the scrutiny which the court has to conduct and the conclusion which could be drawn, based on a dying declaration is concerned, in para 17, the court had observed as follows :-

“17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case.”

(Underlining by us)

37. The issue of reliability of a dying declaration arose for consideration before the Supreme Court in ***AIR 2007 SC 2020 State of Rajasthan vs. Wakteng***. In this case, the dying declaration was recorded two days after the occurrence. The doctor's certificate about the mental state of the deceased was absent. There was also no evidence as to why the magistrate could not be called for recording the statement. The court held that such a

declaration would be unreliable. In para 15 of this pronouncement, the Supreme Court observed thus:

“though great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person however it cannot be sufficiently emphasized that the court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the court must be satisfied that the deceased was in a fit state of mind to make a statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancor. Once, the court is satisfied that the dying declaration is true and voluntary, it is sufficient for the purpose of conviction”.

38. As noticed above, upon being satisfied with regard to the admissibility of a statement attributed to a deceased, the court must satisfy that the person making the declaration was conscious and fit to make the statement. It is well settled that upon being so satisfied, even an uncorroborated dying declaration can be the basis for finding a conviction for murder. This proposition is unassailable.

39. The Supreme Court had occasion to consider the entire gamut of law relating to dying declarations; their admissibility and relevance in the pronouncement reported at **(2001) AIR SCW 2481 Smt. Laxmi vs. Om Praksh & Ors.** In this case, the prosecution was relying upon five dying declarations which included, firstly, a

statement alleged to have been made by the deceased to the ASI on way from the residence of accused persons to the hospital; secondly, a statement of the deceased to the attending doctor; a third dying declaration alleged to have been made to the magistrate; a fourth dying declaration made to the investigating officer and the fifth declaration, alleged to have been made to her brother. These five statements attributed to the deceased coming from the mouths of different witnesses were not found worthy of being accepted or acted upon as such dying declarations to base a conviction thereon. It was held by the Supreme Court that none of these statements could form the basis for conviction of the accused persons, inter alia, for the reason that there was no medical evidence to show that the deceased was in a fit state of mind and physical condition to have made the statement at the relevant time when it was recorded.

40. In ***Laxmi vs. Om Prakash & Ors. (supra)***, the Supreme Court has pointed out that the admissibility of the dying declaration rests on the principle of necessity. The principles thereof have been culled out in the following terms in paras 28 and 29 of the pronouncement which shed valuable light on the issue under examination in the present case and read as follows:-

“28. A dying-declaration not being a deposition in Court, neither made on oath nor in the presence of the accused and therefore not tested by cross-examination is yet admissible in evidence as an exception to the general rule against the admissibility of hearsay. The admissibility is founded on the principle of necessity. The weak

points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the relevant attendant circumstances. [see **Tapinder Singh Vs : State of Punjab** 1970CriLJ1415. One of the important tests of the reliability of the dying declaration is a finding arrived at by the Court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the court may in the absence of corroborate evidence lending assurance to the contents of the declaration refuse to act on it. In **Bhagwan Das** vs **State of Rajasthan** - [1957]1SCR854 the learned Sessions Judge found inter alia that it was improbable if the maker of the dying declaration was able to talk so as to make a statement. This Court while upholding the finding of the learned Sessions Judge held the dying-declaration by itself insufficient for sustaining a (SIC)con charge of murder. In **Kako Singh @ Surendra Singh** Vs **State of M.P.** 1982CriLJ986 : 1982CriLJ986 the dying declaration was refused to be acted upon when there was no specific statement by the doctor that the deceased after being burnt was conscious or could have made coherent statement. In **Darshan Singh** Vs . **State of Punjab** : 1983CriLJ985 this Court found that the deceased could not possibly have been in a

*position to make any kind of intelligible statement and therefore said that the dying declaration could not be relied on for any purpose and had to be excluded from consideration. In **Mohar Singh and Ors.** etc. vs. **State of Punjab**: 1981CriLJ998 the dying declaration was recorded by the investigating officer. This Court excluded the same from consideration for failure of the investigating officer to get the dying declaration attested by the doctor who was alleged to be present in the hospital or any one else present”.*

(Emphasis supplied)

41. Mr. Sumeet Verma, learned counsel appearing for the respondent - Gulbeg Ali has drawn our attention to the judgment of the Supreme Court reported at **(2007) 11 SCALE 477, Nallapati Sivaiah v. Sub Divisional Officer, Guntur, Andhra Pradesh** wherein the court ruled thus:-

“28. In *K. Ramachandra Reddy v. Public Prosecutor* [(1976) 3 SCC 618 : 1976 SCC (Cri) 473 : AIR 1976 SC 1994] the Court having noticed the evidence of PW 20 therein who conducted the post-mortem that there were as many as 48 injuries on the person of the deceased out of which there were 28 incised wounds on the various parts of the body including quite a few gaping incised injuries, came to the conclusion that in view of those serious injuries it was difficult to believe that the deceased would have been in a fit state of mind to make a dying declaration. It was also a case where the Magistrate did not put a direct question to the injured whether he was capable mentally to make any statement. In the circumstances this Court came to the conclusion that the Magistrate committed a serious irregularity in “not putting a direct question to the injured whether he was

capable mentally to make any statement”. It has been observed that even though the deceased might have been conscious in the strict sense of the term,

“there must be reliable evidence to show, in view of his intense suffering and serious injuries, that he was in a fit state of mind to make a statement regarding the occurrence”.

The certificate issued by the doctor that the deceased was in a fit state of mind to make statement by itself would not be sufficient to dispel the doubts created by the circumstances and particularly the omission by the Magistrate in not putting a direct question to the deceased regarding the mental condition of the injured.

29. In the case in hand before the actual recording of Ext. P-8, dying declaration, the Magistrate (PW 7) did not seek and obtain any opinion and a certificate or endorsement from the duty doctor as to the physical and mental condition of the declarant to give statement. The Magistrate did not put any question as to whether the declarant was making a voluntary statement and whether he was in a fit condition to make the statement and whether any sedatives had been administered.

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35. In *Laxman v. State of Maharashtra* [(2002) 6 SCC 710 : 2002 SCC (Cri) 1491] a Constitution Bench of this Court held: (SCC pp. 713-14, para 3)

“3. ... The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a

product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration

can be acted upon *provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.*”

(emphasis supplied)

36. The Constitution Bench in its authoritative pronouncement declared that there is no requirement of law that dying declaration must *necessarily* contain a certification by the doctor that the patient was in a fit state of mind especially when a dying declaration was recorded by a Magistrate. It is the testimony of *the* Magistrate that the declarant was fit to make the statement gains the importance and reliance can be placed upon declaration even in the absence of the doctor provided the court ultimately holds the same to be voluntary and truthful. The judgment does not lay down a proposition that medical evidence, even if available on record, as also the other attending circumstances should altogether be ignored and kept out of consideration to assess the evidentiary value of a dying declaration whenever it is recorded by a Magistrate.

37. The Constitution Bench in *Laxman* [(2002) 6 SCC 710 : 2002 SCC (Cri) 1491] resolved the difference of opinion between the decisions expressed by the two Benches of three learned Judges in *Paparambaka Rosamma v. State of A.P.* [(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] and *Koli Chunilal Savji v. State of Gujarat* [(1999) 9 SCC 562 : 2000 SCC (Cri) 432] and accordingly held that there is no requirement of law that there should be always a medical certification that the injured was in a fit state of mind at the time of

making a declaration and such certification by the doctor is essentially a rule of caution and even in the absence of such a certification the voluntary and truthful nature of the declaration can be established otherwise.”

42. Mr. Sumeet Verma, learned counsel appearing for Gulbeg Ali has also placed the pronouncement of the Supreme Court reported at 2001(3) SCALE 549, Arvind Singh v. State of Bihar wherein also the prosecution case rested on a dying declaration made to the mother of the deceased. In this case, the court observed as follows:-

“17. Be it noted that the dying declaration herein has not been effected before any Doctor or any independent witness but to the mother who is said to have arrived at the place only in the morning - the mother admittedly is an interested witness: though that by itself would not discredit the evidence tendered in Court but the fact remains the Doctor's evidence considering the nature of the burn posed a considerable doubt as to whether such a statement could be made half an hour before the death of the accused. It is not that the statement of the unfortunate girl was otherwise not clear or there was existing some doubt as to the exact words on the contrary the definite evidence tendered is that there is clear unequivocal statement from the daughter of the family that the conjoint efforts of putting kerosene thereafter with lighted match stick has resulted the burn injury. The severity of the burn injury and its impact on the body speaks volume by reason of the death of the deceased. It is the reliance on such a dying declaration by the High

Court shall thus have to be scrutinised with certain degree of caution.

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20. Dying declarations shall have to be dealt with care and caution and corroboration thereof though not essential as such, but is otherwise expedient to have the same in order to strengthen the evidentiary value of the declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence. In our view question of the dying declaration to the mother is not worth acceptance and the High Court thus clearly fell into an error in such an acceptance. ...

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24. ... There is no challenge by the State as against the order of acquittal of other three accused person under Section 304B as such we are not inclined to delve into the matter as regards the involvement of the other three persons but the appellant's explanation of stove-burst being the cause of the event cannot be brushed aside. It is undoubtedly a social and heinous crime to have the wife burnt to death but without any proper and reliable evidence, the law court can not by itself also justify its conclusion in the matter of involvement of the husband; Direct evidence may not be available but circumstantial evidence with reasonable probity and without a snap in the chain of events would certainly tantamount to a definite evidence about the involvement but not otherwise. What is the evidence available in the matter -

To put it shortly, there is none! The factum of burn injury cannot be doubted and the subsequent unfortunate death but that is about all. Why was the Investigation officer not examined - No answers are forthcoming even at this stage - but why not? Is it a lacuna? We need not dilate thereon but the fact remains there is not a whisper in regard thereto!”

43. It is therefore, well settled that it is not the satisfaction of the person recording the dying declaration alone with regard to the fitness of the persons to whom the same is attributed but the court has to be satisfied that the person to whom the statement is attributed, was actually in a fit state of mind and actually made the statement which has been attributed to her.

44. In (2011) 4 JCC 2478, State v. Sanjay, the State had sought leave to appeal against acquittal of the respondents inter alia on the ground that the dying declaration recorded by the SDM was not accompanied by his certification of the fitness of the deceased to make the statement. The following observations of this court while dismissing the State’s petition shed valuable light on the challenge by the respondents before us:-

“6. ... The Supreme Court held stated that there is no obligation that the dying declaration must necessarily contain a doctor's endorsement to the effect that the patient or injured person is fit and in an oriented state of mind to make a statement; as long as the person recording it, is able to depose about it, and is credible and trustworthy, the dying declaration can be said to have been recorded in the circumstances, in a given case.

7. In this case, significantly, the Trial Court concluded that the deceased had been declared fit to make the statement at 11.30 AM in the morning, whereas the declaration was recorded only at 03.00 PM and given the severity of her burns, while she might have been fit to make the statement at 11.30 AM, there was no reassurance that she was fit to make it at 03.00 PM. The SDM, it was held, therefore, should have obtained certification as to her fitness right before he sought to record her statement, at 3.00 PM. We find no infirmity or misapplication of law in this approach. While a person, with extensive burn injuries might be in a position to make a statement or declaration, at the time, when she is brought to the hospital, as long as she is conscious, the longer the time taken in recording any statement, the likelihood of the injured's mental condition deteriorating is strong, given that in most cases, they are administered sedatives to ease the pain and trauma. In such circumstances, it would be reasonably expected that before a dying declaration is recorded, the SDM or responsible officer, assures that the patient indeed is in a position to make a statement, and is conscious to do so. The prosecution's failure to lend assurance was a serious infirmity which cast a doubt on its version.”

45. We may note that the facts in State v. Sanjay (supra) are similar to the factual matrix placed before us.

46. Ex.PW10/A does not reflect any certification of the injured person's fitness to make the statement. There is no document accompanying the statement wherein medical information with regard to the injured person's fitness to make the statement has

been given by a doctor. PW-10 has categorically stated that he had not taken a fitness certificate of the injured from the doctor on the paper upon which the statement of the injured was recorded. He has volunteered that the fitness certificate was recorded by the doctor on her medical papers and she was fit to make a statement “*as per my estimation*”. PW-10 has claimed that he put some questions to the injured when he found her fit to make a statement. He admits that he had not recorded any such questions put to the injured on any paper. Such questions are not part of Ex.PW10/A. The witness also states that the injured was feeling pain at the time when he claimed to have recorded the statement. What were the medical papers looked at by PW-10 remains a mystery.

47. PW-10 – Shri P.K. Sofat has at another stage stated that he relied in declaration of the petitioner’s fitness to make the statement as recorded on her MLC. This MLC has been recorded at 4:00 am in the morning. This witness claims to have recorded the statement at about 7:50 am i.e. almost four hours after the recording of the MLC. No questions appear to have been put to the injured person which could establish her fitness to make the statement. The above circumstances manifest that there is no evidence which would show that the injured person was in a fit condition to make the statement which has been attributed to her.

48. We also find that no record of the treatment given to the injured person after she was taken to the hospital has been placed or proved on record by the prosecution. A person who has suffered 100% burns and is suffering from muscle stiffness would be in

absolute agony and there is every possibility of pain killers and sedatives having been administered to her. This factor renders it even more essential that expert opinion with regard to the fitness of the person to make a statement is taken immediately or proximately before the recording of the statement. Certainly no reliance can be placed on fitness taken four hours prior to the recording of the statement of such injured person.

49. Dr. Satish Chandra, Jr. Resident in Guru Teg Bahadur Hospital, Shahadara, Delhi-110095 who recorded the MLC was not examined as a witness. Instead the Medical Superintendent, GTB Hospital deputed Dr. Ravinder Singh, Chief Medical Officer who was examined as PW-15. Dr. Ravinder Singh could merely identify the writing and signatures of the junior doctor in 'official capacity' as a doctor had performed duty with him in the GTB Hospital in those days. PW-15 has merely reproduced the contents of the MLC in his oral deposition and has confirmed that the patient was referred to the surgery department for further management. PW-15 has stated that the doctors from surgery department were called and had attended and taken the patient for further management. Dr. Singh has categorically stated that his deposition before the court was based only on what has been recorded in the MLC (Ex.PW15/A and Ex.PW15/B) and that the same were not prepared in his presence. The witness also stated that the articles mentioned in the MLC – Ex.PW15/A (elastic rope) had not been sealed by the concerned doctor in his presence. This

witness therefore had no personal knowledge about the condition of the deceased or her fitness.

50. It is complained that as a result of the non-production of Dr. Satish Chandra, Jr. Resident who scribed the MLC of the deceased, the defence has been deprived of an opportunity to cross-examine the doctor who has recorded the MLC with regard to his claimed observations or the fitness of the patient to make any statement at all or the correctness of the noting recorded by him on Ex.PW15/A.

51. Before us, the respondents have strongly assailed the fitness of the patient to have made any kind of statement or the fact that she was at all oriented. In this regard, our attention has been drawn to the fact that even the MLC notes that she had suffered 100% burns all over the body and that there was extensive stiffness of skin while her pulse rate was 120 per minute.

52. Medical texts support the conclusion that it is not skin stiffness, it is actually muscle stiffness.

53. Before this court, Ms. Ritu Gauba, learned APP for the State has urged that the statement recorded by the Executive Magistrate does not require medical certification and that the only requirement of law is the satisfaction of the Magistrate of the fitness of the maker of the statement. It has been contended that this satisfaction was duly effected by PW-10. This submission is to be noted only for the sake of rejection. In the instant case, the statement – Ex.PW10/A does not support that the Executive Magistrate took any steps for being satisfied about the fitness of the deceased.

There is no material at all that she was in a fit state of mind to give the long statement which is attributed to her.

54. Ms. Ritu Gauba, learned APP for the State has drawn our attention to chapter 13A relating to Dying Declaration of Volume III of the Delhi High Court Rules. Rules 3,4,7 and 8 are relevant and read as follows:-

“3. Fitness of the declarant to make the statement should be got examined – Before proceeding to record the dying declaration, the Judicial Magistrate shall satisfy himself that the declarant is in a fit condition to make a statement, and if the medical officer is present, or his attendance can be secured without loss of time, his certificate as to the fitness of the declarant to make a statement should be obtained. If, however, the circumstances do not permit waiting or the attendance of the Medical Officer, the Judicial magistrate may in such cases proceed forthwith to record the dying declaration but he should note down why he considered it impracticable or inadvisable to wait for a doctor’s attendance.

4. The Statement of the declarant should be in the form of a simple narrative – The statement, whether made on oath or otherwise, shall be taken down by the Judicial Magistrate in the form of a simple narrative. This, however, will not prevent the Judicial Magistrate from clearing up any ambiguity, or asking the declarant to disclose the cause of his apprehended death or the circumstances of the transaction in which he sustained the injuries. If any occasion arises for putting questions to the dying man, the Judicial Magistrate should record the question also the answers which he receives. The actual words of the declarant should be taken down and not merely

their substance. As far as possible the statement should be recorded in the language of the declarant or the Court language.

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7. Recording of a Dying declaration by a Police Officer or Medical Officer – Where a dying declaration is recorded by a Police Officer or a Medical Officer, it shall, so far as possible, be got attested by one or more of the persons who happen to be present at the time.

8. Fitness of the Declarant to make a statement to be certified by the Judicial Magistrate or other officer concerned – The Judicial Magistrate or other officer recording a dying declaration shall at the conclusion of the dying declaration certify that the declarant was fit to make a statement and it contained a correct and faithful record of the statement made by him as well as of the questions, if any, that were put to him by the justice recording the statement. If the accused or his counsel happens to be present at the time the dying declaration is recorded, his presence and objection, if any, raised by him shall be noted by the judicial Magistrate or the officer recording the dying declaration, but the accused or his counsel shall not be entitled to cross-examine the declarant.”

55. Learned counsel for the respondents have also placed reliance on the above Rules which mandate the manner in which the dying declaration is to be recorded. It was urged that in the instant case, the SDM violated the Rules and proceeded in the manner unknown to law.

56. There is no certification by PW-10 – Shri P.K. Sofat in the instant case in compliance with Rule 8 as well. PW-10 has also violated the mandate of Rules 3 and 4 aforementioned.

57. The above discussion would show that clearly there is no evidence at all that the deceased was fit to make a statement when Ex.PW10/A was recorded.

58. The learned trial judge has therefore, erred in placing reliance on the endorsement of fitness on the MLC – Ex.PW15/A of the deceased. Firstly, the doctor who allegedly made such endorsement was not examined. Secondly, even if the endorsement of fitness at 4:00 am was correct, there was nothing on record to show that the deceased remained fit even at 7:50 am when PW-10 – Shri P.K. Sofat claims to have recorded the statement.

Challenge to the language of the dying declaration

59. The PW-10 has deposed that he has recorded the statement ‘*word by word*’ and that the same took 15 to 20 minutes. It is noteworthy that the investigating officer – PW-16 - ASI Sona Ram has testified that the statement of the injured – Shama Praveen was recorded by PW-10 on the ‘dictation of the injured/deceased – Smt. Shama Praveen’.

60. As the very name of the deceased suggests that the parties involved were Muslim and, therefore, would be speaking in Urdu. The SDM has claimed that he recorded the statement ‘word by word’. The statement finds use of words like ‘*patni, niwasi, vivah,*

pati, dinak, sambandh, evam, uprokt, jaan se marne ki niyat are not words used in common parlance even by a hindi speaking person. These words would not be used by a Urdu speaking person.

61. The tenor of the statement which records that the maker giving '*bayan*' as well as the certification of the same statement being voluntary, in full consciousness and without any kind of pressure is not a statement which any lay person would make, let alone one who has suffered 100% burns.

62. Mr. Sumeet Verma, Mr. Ajay Verma, Mr. Bhupesh Narula, learned counsels representing the respondents in Death Reference no.2/2012 (the appellants in the appeals) have drawn our attention to the top of Ex.PW10/A. The document mentions the DD No.40A as well as PS Gokulpuri thereon. PW-10 – Shri P.K. Sofat says that he has mentioned the daily diary no.40A on Ex.PW10/A. PW-10 has also stated that there was an overwriting in mentioning the date on Ex.PW10/A which he had not initialled. However, PW-16 – Investigating Officer ASI Sona Ram has stated that the SDM has mentioned the DD No.40A on the document but the date as well as the name of the police station has been mentioned by him (PW-16) on Ex.PW10/A - the statement attributed to the deceased.

63. Interestingly, PW-10 – Shri P.K. Sofat confirms that the doctor estimated the injured having suffered 100% burns but in his deposition, he challenges the same contending that it was not correct according to his opinion.

64. Ms. Ritu Gauba, learned APP for the State strongly urged

that the deceased was removed to the GTB Hospital by PW-14 – HC Ravi Shankar Sharma to whom she alleged that she had been burnt by her in-laws. It is urged that such statement is also on the MLC.

65. It is noteworthy that the learned trial court has relied upon only the statement recorded by PW-10 as the dying declaration in the instant case. Neither the last statement appearing on the PCR Form – Ex.PW13/A nor the statement attributed to the deceased as recorded on the MLC – Ex.PW15/A were rightly pressed as dying declaration before the trial court. The learned trial judge has also not relied upon statements attributed to the deceased by PW-3, PW-14 or PW-16. In any case, we have commented upon the reliability and evidentiary value thereof in our above discussion.

66. It is important to note also that it is in this MLC, recorded in the hospital almost one hour after the incident, that for the first time the deceased has attributed the responsibility of her condition to her in-laws.

67. Our attention is drawn to the endorsement contained in the form of the Police Control Room (Ex.PW13/A), more than one hour later, at 04:27:32 hrs on the 22nd of October 2009, the following contradictory report is recorded ‘Inj lady sama parveen d/o sarfarsh r/o above age-26 years jiski sadi ko 5 sal huve hai 2 bache hai sasue, devar, v nnd ka name le rahi hai 100/- jali hui hai add. sho moka hosp. me’ (Translated, it reads : Injured Lady Shama Praveen D/o Sarfaraz R/o above aged 26 years, who got married 5 years ago, having two children blamed her father-in-law,

brother-in-law and sister-in-law. She is 100% burnt. In the presence of Add. SHO in hospital).

68. We have noticed above, the three prior statements of the deceased noted on the form of the Delhi Police Control Room. The statement attributed by PW-14 as having been made by the deceased attributing the culpability to her in-laws was more than one hour after the incident while in the custody of the police and in hospital and is shrouded in suspicion.

69. PW-3 – Sarfaraz while claiming absence from the scene has attributed a statement having been made by the deceased to this effect in his presence thereof. He discloses neither time nor place of the statement. Given her first complaint to the police and the first record on Ex.PW13/A at 3:07 am of a quarrel and then at 3:27:57 after the PCR van had reached, it is recorded that a lady having self immolated herself, the third statement attributed to the deceased blaming her in-laws is shrouded in suspicion. Even if such statements were made the possibility of tutoring of PW-3 given the animosity nursed by him against his father and other siblings for property, cannot be ruled out.

70. In para 118 of the trial court judgment, the learned trial judge has recorded that the dying declaration recorded by PW-10 stood corroborated by the Police Control Form – Ex.PW13/A; MLC – Ex.PW15/A; and the FSL report – Ex.PW17/3. We have discussed in detail above that the Police Control Form does not support the case of the prosecution or the dying declaration in any manner. The doctor who is alleged to have endorsed the MLC –

Ex.PW15/A was not produced while the Forensic Science Laboratory report does not support the prosecution.

71. In para 124 of the impugned judgment, the learned trial judge has referred to the accused persons as caretakers of the deceased who have acted “just to deprive her from property”. We are unable to find any factual basis for the same.

Place of recording Ex.PW10/A

72. There is important doubt urged by learned counsels for the respondents on the recording of this statement as claimed by PW-10 – Shri P.K. Sofat. This witness has repeatedly stated that he reached the hospital at 7 o’clock and recorded the statement of the deceased in the ‘*burns ward*’. The witness has categorically stated that the police officials had taken him to the bed of the injured in the ‘burns ward’ of the GTB Hospital. The witness has claimed that he contacted the doctor on duty in the ‘*burns ward*’ for five minutes only. He reiterates that he did not visit any other place except ‘burns ward’.

73. Our attention has been drawn by learned counsels for the accused to the categorical claim by Shri P.K. Sofat as PW-10 that the injured person was in the burns ward; that he met the doctors in this ward before recording her statement. It is urged that the hospital records falsify the claim of PW-10. Our attention is drawn to the following death summary (Ex.PW16/E) relating to Shama Praveen recorded on 23rd October, 2009 by the doctor:-

“23/10/09 Pt. Shama Praveen age 26 y/f with CR-
No.-200925479053, MLC – Mo – a –

4964/9 was admitted in general surgery emergency on 22-10-09 c alleged H/o thermal burn and diagnosed as 96% thermal burn c facial burn and respiratory burn with deep burn all over body. Pt. Immediately put on conservative management O₂ iv. fluids, w-antibiotics, iv analgesic, and iv antacids Pt. was critical as the time of admission. ICU, ophthalmology referral were made. At 10.am pt. transferred to burn ward on 23-10-09. Pt. complained of restlessness and cardiopulmonary resuscitation was done. But despite of all efforts of Medical, Paramedical and nursing staff patient couldn't be revived and declared clinically dead at 2.20 AM on 23.10.09.”

(Emphasis by us)

Therefore, as per the death summary dated 23rd October, 2009 (Ex.PW16/E), the patient was critical at the time of her admission. She was shifted to the Burns Ward of the GTB Hospital only at 10:00 am.

74. The MLC – Ex.PW15/A shows that the patient was referred to the surgical ward. The document proved on record establishes that the injured was transferred to the burns ward only at 10:00 am and not before. It is therefore, clear that PW-10 – Shri P.K. Sofat is not even sure of the place where he met the deceased. PW-16 ASI Sona Ram has also stated that SDM reached the hospital at

about 7:00 am and recorded the statement in the burns ward. The deceased was not in the burns ward at 7:00 am or at 9:00 am.

75. Before us learned APP for the State has submitted that the statement of PW-10 to the effect that he recorded Ex.PW10/A in the burns ward was a mistaken statement and deserves to be ignored as it is only a matter of detail. Perhaps, if there were no other circumstances casting doubt over the dying declaration, we may have been persuaded by the learned APP to hold so. However, we have noted above the several reasons which cast doubt with regard to the recording of the dying declaration. It is, therefore, not possible to agree with the learned APP.

76. Most importantly, this was not the case of the prosecution before the trial court. A perusal of the impugned judgment dated 17th March, 2012 would show that in para 100, the learned trial judge has also concluded that the dying declaration was recorded in the burns ward. In our view, this finding ignores material documentary evidence specially to the effect that the deceased had not even shifted to the burns ward at 7:50 am where PW-10 – Shri P.K. Sofat claimed to have recorded the statement. This finding is, therefore, unsustainable.

77. As per the record of GTB Hospital, Shahadara, Delhi, the injured had suffered thermal burns which were diagnosed as 96% thermal burns with included facial burns and respiratory burns with deep burns all over the body. The patient was critical at the time of her admission. ICU as well as ophthalmology referrals were made. The patient was transferred to the burns ward only at 10:00 am on

23rd October, 2009. While PW-10 – Shri P.K. Sofat claims to have recorded the statement at 7:50 am, PW-3 – Sarfaraz Hussain has stated that the SDM recorded the statement at 9:00 am.

Persons present when Ex.PW10/A allegedly recorded

78. As per PW-10 – Shri P.K. Sofat when he reached the bed of the injured – Shama Praveen, no one was present near her. As against this, PW-3 – Sarfaraz Hussain has stated that PW-16 – ASI Sona Ram had recorded the statement of his wife (the injured Shama Praveen) at GTB Hospital in his presence and that he had read over her statement to his wife which was recorded by ASI Sona Ram after 15 to 20 minutes of reaching the hospital when ASI Sona Ram, two other police officials and he were present. PW-3 has claimed that his elder brother-in-law Shamim Raja (PW-4) was also present there at that time.

79. PW-3 – Sarfaraz Hussain has further stated that his wife's statement was recorded after 9:00 am by the SDM in his presence. PW-3 – Sarfaraz Hussain also states that ASI Sona Ram had recorded the statement of his wife at the GTB Hospital in his presence. PW-3 categorically stated that doctors had obtained the thumb impression of Shama Praveen on her dying declaration in his presence and that he had also put his signatures on some other documents. PW-4 – Shamim Raja, PW-10 – Shri P.K. Sofat and PW-16 – ASI Sona Ram do not make such a deposition. No such statement with thumb impressions of PW-3 – Sarfaraz Hussain has been placed before us.

80. PW-10 – Shri P.K. Sofat does not disclose the particulars of the person who identified Shama Praveen to him. He is unable to give the names of any doctor, nurse, police personnel or relatives in the hospital. The respondents have doubted the testimony of PW-10 on this short ground as well and submitted that PW-10 neither visited the hospital nor recorded any statement of the deceased.

81. It is evident from the above discussion that the Executive Magistrate, Shri P.K. Sofat (PW-10) has violated Rules 3 and 4 of Chapter 13A of Volume III of the Delhi High Court Rules. There is strength in the submission of learned counsel for the respondents that the statement appears to be in the language of parlance used by the police while recording statements and therefore, would support the submission that the statement was not recorded by the PW-10 in the manner or circumstances as alleged.

82. Mr. Ajay Verma, learned counsel appearing in Crl.A.No.473/2012 filed by Mubin Fatima and representing her in the Death Reference no.2/2012, has urged at length that the testimony of PW-10 – P.K. Sofat, PW-14 – HC Ravi Shankar Sharma and PW-16 – ASI Sona Ram requires to be disbelieved. It is contended that the above noticed circumstances cast considerable doubt as to whether PW-10 at all visited GTB Hospital. We may note that neither the police nor PW-10 have produced any document which would support that he visited the hospital at all.

83. The above discussion also shows that the time of recording the statement; fitness of the injured person as well as the place

where the statement is claimed to have been recorded are all doubtful. There is doubt even with regard to the persons present at the time. PW-3 has stated that a statement was recorded by the police officials. Looked at from any angle, the statement is not in the language of the deceased.

Challenge to recoveries

84. As per the case of the prosecution, an elastic rope was tied around the neck of the deceased by the accused Zulfikar Ali before kerosene was poured over her and she was set alight.

85. We have set out hereinbefore the complete details of the articles which were seized by the police from the spot. This recovery in the very early hours of the 22nd October, 2009 was effected in the presence of husband of the deceased, Sarfaraz Hussain who has signed the recovery memo as a witness thereto.

86. The prosecution has sought to establish the recovery through the testimony of PW-3 – Sarfaraz Hussain. The sealed parcels were opened in the court when his statement was being recorded. PW-3 has proved the recovery of rubber/elastic – Ex.P-1 which was approximately 12 inch long stated to have been recovered from neck of the deceased in the GTB Hospital. The second parcel which was found sealed with the seal of the FSL, Rohini produced by the MHC (M) was found containing one matchbox; some burnt cloth pieces; having a 16 inch long electric wire and pieces of broken bangles of sky blue and golden colour. When the matchbox of the make ‘ship’ was opened, it was found containing three used

matchsticks, 8 alive matchsticks, four broken pieces of bangles of golden and sky blue colour which were collectively exhibited as Ex.P-2. The prosecution has given no explanation with regard to the discrepancy and as to how additional items which were not mentioned in the recovery memo – Ex.PW16/B (that is the electric wire; three, instead of two used matchsticks; broken pieces of bangles).

87. It is important to note that PW-16 – ASI Sona Ram has categorically testified that the matchbox (ship) had two used matchsticks. There is also no mention of electric wire or broken bangles either in his oral testimony or in Ex.PW1/B. The number of used matchsticks has gone up from two to three and articles added.

Forensic examination

88. It is in evidence that these recovered articles as well as elastic rope allegedly found on the neck of the deceased were sent to the Forensic Science Laboratory for a forensic examination.

89. The report dated 30th November, 2010 of the Forensic Science Laboratory has been proved on record as Ex.PW17/B. Our attention is drawn to the report of the forensic examination on the following articles:-

“DESCRIPTION OF ARTICLES CONTAINED IN THE PARCEL(S)/EXHIBIT(S)”

XXX

Exhibit-‘1’ : Stretchable strip stated to be “plastic thread”.

Exhibit-‘2’ : One sealed cloth parcel sealed with the seals of “SR”. It was found to contain exhibits ‘2A’ & ‘2B’ wrapped in a polythene.

Exhibit-‘2B’: One match box make SHIP KARBORISED containing burnt & unburnt match sticks, kept in a polythene.

Exhibit-‘3’ : One empty plastic bottle with cap.

Exhibit-‘4A’ : One partially burnt/torn kurta with dirty stains.

Exhibit-‘4B’ : One partially burnt/torn pyajama with dirty stains.

Exhibit-‘5’ : Bunch of hair.”

90. The result of the forensic examination of these recovered articles is as follows:-

“RESULTS OF EXAMINATION”

On Chemical & GC examination, (i) Exhibits ‘3’ and ‘4A’ were found to contain residue of Kerosene.

(ii) Residue of Kerosene/Petrol/Diesel could not be detected in exhibits ‘1’, ‘2A’, ‘2B’, ‘4B’ and ‘5’.”

Thus as per the report of the laboratory, no kerosene was found on plastic/elastic rope around the neck of the deceased; on

the hair of the deceased; partially burnt clothes of the deceased; or on the matchsticks.

Improbability of prosecution case

91. Learned counsels for the accused persons have pointed out that the impossibility of the incident having taken place in the manner as projected before the trial court is manifest from the claim of the prosecution that there was an elastic/plastic rope around the neck of the deceased. As noticed above, the length of such rope was barely 12 inch which would be much less than the neck of the deceased person. Even if such rope was around her neck as claimed, the prosecution has set up a case of the rope being tied around the neck of Shama Praveen and kerosene being poured before setting her alight. It is an admitted position that the injured was excessively burnt when she was taken to the hospital. The burns covered her face as well as chest area and all limbs. If the rope had been around the neck of a person who was burning, such plastic or elastic rope would have itself got burnt and damaged. Both plastic and elastic are highly combustible substances. Plastic has a very low burning threshold. The manner in which the plastic has been recovered would by itself suggests that this rope was not around the neck of the deceased at the time when she was burning.

92. On this aspect, we find that in the post-mortem report – Ex.PW16/E1, the doctor has observed a ligature mark present on the front of her neck to right side back of the neck having the total length of 28 cms. The prosecution has not connected the rope

which was allegedly recovered with the ligature mark. It would be difficult to use a rope of 12 inches to result in a ligature mark of 28 cms. (equal to about 12 inches). It remains a mystery as to how, if the rope was actually around the neck of the deceased before she was burnt, this elastic/plastic rope did not suffer any damage of burning.

93. Learned APP for the State has submitted that there were marks of the struggle on the body of the deceased which depicted that homicide injuries had been imposed on her. Learned APP for the State has urged that the presence of the plastic rope shows that the accused tried to gag the mouth so that no cries of the victim could be heard by the neighbours. There is no evidence to support this. The above discussion would show that there is doubt that the rope was around the neck of the deceased before she was set alight. In this regard reference may be made to the testimony of PW-18 – Dr. Meghali Kelkar who has stated that if ligature material is used on the person of injured in burnt condition, ligature mark would appear. Given the presence of public persons as well as arrival of the police, it was for the prosecution to explain how such marks of the rope appeared on the body of the deceased which they are failed to do so.

94. No kerosene has been detected on the hair or clothes of the deceased. The MLC also does not have any record of smell of kerosene from the body of the deceased.

Improbability of the incident as alleged

95. We may now examine as to whether the offences could have been committed in the manner made out in the dying declaration – Ex.PW10/A. As per Ex.PW10/A, Gulbeg Ali and Zulfikar Ali brought the deceased Shama Praveen to the room on the first floor; Zulfikar Ali tied the elastic rope around the neck of Shama Praveen and thereafter the third accused Mubin Fatima held her while her father-in-law, Gulbeg Ali put kerosene oil on her and set her alight with a matchstick.

96. Learned counsel for the respondent has drawn our attention to the photographs (Ex.PW6/A1) to Ex.PW6/A11) taken by the police of the scene of occurrence. We may note that these photographs were put to the investigating officer – PW-16 ASI Sona Ram who had confirmed that these photographs correctly depicted the scene of the crime. Ex.PW6/A6 is a photograph showing a bottle claimed to have been smelling of kerosene seized from the spot from which kerosene was allegedly poured over the deceased. This photograph also includes the photograph of the foot of a child who is sleeping on a mat on the ground right next to the bottle. The photograph – Ex.PW6/A7 of the same spot includes the image of another child sleeping on the same mat with a similar covering in the room. The photographs contain no sign of any violence or an incident in which kerosene could have been poured over a healthy adult and she could have been burnt in the room.

97. It is in evidence the Gulbeg Ali was staying with his unmarried daughters on the first floor while Zulfikar Ali was residing on the ground floor with one child. Only the deceased had two children with whom she was residing. The photographs of the room where the kerosene bottle has been found show that toys, utensils and other articles are all lying in their places in intact condition. There is no sign of any violence at all. It is a case of prosecution that the photographs were taken at the earliest between 5:00 am to 5:30 am in the morning and there is no allegation of tampering with the spot. It is, therefore, quite clear that the deceased was not burnt in the circumstances which she has alleged in the statement attributed to her or as sought to be established by the prosecution.

98. Learned counsel has drawn our attention to the site plan of the premises – Ex.PW8/A which would show that the total room size of the first floor (including the area of the WC) was 208/228 cms. It included a WC of 67/90 cms. If the area of the WC was taken out, space of barely about 5 feet x 7 feet is left out. The photographs show that there was furniture and other articles in the first floor room.

99. We have noticed in the opening of the judgment that the property in question is a 22 sqr.ydrs. tenement in the Chaman Park, Delhi. The property forms one in a row of similar tenements as per the sketch of the area – Ex.PW3/B. The house has no open area and access to the first floor (upper ground floor) as well as second floor is by bamboo ladders. There is thus not even a staircase. The

width of the ladder as per the evidence on record is barely 50 cms. Gulbeg Ali is stated to be 74 years of age while his son Zulfikar Ali is also a grown up married adult of 27 years.

100. As per the site plan – Ex.PW8/A, the bamboo ladder going to the first floor premises is shown to be of 169 cms length and 50 cms wide. It is alleged that Gulbeg Ali, father-in-law of the deceased and Zulfikar Ali, her brother-in-law, first brought her to the first floor from the second floor where she was set aflame. She then came down through the ladder to the ground floor. Thus the case of the prosecution was that the deceased came down the ladder after she had been set aflame.

101. The incident involved three persons according to the statement attributed to the deceased by the SDM. It is alleged that Mubin Fatima, sister-in-law of the deceased held the deceased while Gulbeg Ali pouring kerosene over her and set her aflame. It is not the case of the prosecution that the hands and feet of the deceased were tied. Any person would have responded violently to an attempt to burn her by third parties. Given the past history of disputes between the parties, certainly the deceased would not have willingly come down with her father-in-law or brother-in-law. She would also not have remained silent if efforts were made by a third person to put kerosene over her. There is no evidence led of any protest by the deceased. There is also no evidence of any kind of a struggle by the deceased in either trying to free herself from the clutches of Mubin Fatima if she had been held as alleged or of trying to escape from the room. The prosecution case is that the

deceased was set alight in the same room where kerosene was poured over her. There is no sign of anything burning in the room. Most importantly that there is no explanation at all from the side of the prosecution as to how two children continued to sleep in the immediate proximity of such violence without being disturbed in any manner.

102. If the deceased was burnt on the first floor and reached the outside of the building while still burning and met PW-14, there would have been some tell tale signs of burns. Other articles in the room may have caught fire given the size of the room. The bamboo ladder also remained intact.

103. As noticed above, there is not only no sign of violence in the room but also nothing to show that the deceased has been set alight in the room. No damage from the fire has been caused to the bamboo ladder even. Even otherwise, it is difficult, if not impossible for two persons to bring down another adult on this ladder in the circumstances alleged without any protest from her side.

104. There is evidence of several persons in the public having met PW-14 – Ravi Shankar Sharma as well as PW-16 – ASI Sona Ram but no neighbour has heard of any protest or noise except for the noise when the deceased was burning.

105. It is also noteworthy that the bottle reflected in the photographs wherefrom smell of kerosene was coming seized from the spot was having small neck. If kerosene was poured on any person of a bottle of such a small neck, it is inevitable that it would

have splashed on other articles or split on the floor. PW-14 – HC Ravi Shankar Sharma and PW-16 - ASI Sona Ram claims to have reached the spot at 3:30 am to 3:40 am. They make no mention at all of finding any oil split on ground or anywhere else in the room.

106. The photographs show the bottle from which the smell of kerosene was coming as lying in the room where the children of the deceased were sleeping as well. The family of the deceased resided on the second floor. The photographs of the first floor show water cans lying in the premises. The photographs thus show that no incident took place on the first floor.

107. It is left to imagination as to how Mubin Fatima held the deceased while kerosene was being poured over her without any kerosene spilling on to her clothes.

108. PW-3 – Sarfaraz was the only eye-witness to the occurrence who has alleged that the incident took place on the ground floor. Mr. Bhupesh Narula, learned counsel for Zulfikar Ali points out that as per the alleged dying declaration and the prosecution, the incident occurred on the first floor of the property. All these circumstances completely belie the case of the prosecution.

109. The learned trial judge has also erred in holding that Gulbeg Ali has not explained how and when the deceased came to the first floor. The same is apparent from the testimony of PW-3 – Sarfaraz, husband of the deceased detailed above.

Arrest of accused persons

110. PW-16 ASI Sona Ram has attempted to cast a doubt over the conduct of Gulbeg Ali, his son Zulfikar Ali and daughter Mubin Fatima after the incident. He has stated that he made a search of the accused persons and “overpowered them from their Gali at some distance from the spot on the pointing out of PW-3 – Sarfaraz Hussain at about 7:30 pm on the 22nd of October 2009”.

111. Surprisingly, this witness, the investigating officer states that he was not even aware of the fact that Gulbeg Ali was removed to the hospital by PW-14 – Head Contable Ravi Shankar Sharma and that as per the MLC (Ex.PW15/B), he had also suffered 10% burns and was kept under observation at the GTB Hospital. The accused persons have alleged that they were arrested by PW-16 from the GTB Hospital.

Explanation of the accused persons

112. It is an integral part of ‘fair trial’ that the accused persons are given an opportunity to render their explanation with regard to the incriminating circumstances brought out against them. The statute provides such opportunity under Section 313 of CrPC. In their statements, the three accused persons have stated that they are innocent and have been falsely implicated. Gulbeg Ali in this regard has stated as follows:-

“I am quite innocent and have been falsely implicated in the present case. I had been lifted from my house at about 05:00 a.m. on 22.10.2009. On the intervening night of 21st and 22nd, October, 2009, I woke up on

hearing the noise and noticed that deceased Shama Praveen was crying and the smell of kerosene oil was coming from her body, she was saying that today she would get implicated all of us in the present false case and in the meantime her husband also came but at that time she had put herself on fire. I along with my son Zulfikar tried to save her and in doing so I sustained burn injuries. Someone had called PCR, which came and took me and injured Shama Praveen to GTB Hospital and after that my sons – Sarfraz and Zulfikar also came to GTB Hospital. At P.S. police obtained my signatures on some blank papers. My son Sarfraz so many times beaten my daughters Mubin Fatima and Chandkiran. Only Sarfraz along with deceased Shama Praveen used to quarrel with me on claiming his share in the house, but, I always advised them to give the same after getting marriage of my other daughters and deceased Shama Praveen after giving false statement got us implicated in the present case. After the present case, since long I am in JC my son Sarfraz along iwth Smt. Shahnaz and other took my household goods by selling out my house. Now I have got retered FIR No.36/2012 with Police Station Gokalpuri against Sarfr az, Smt. Shahnaz and others u/s 420/34 IPC.”

113. The other accused persons have deposed on similar terms.

In terms to question no.44, Zulfikar Ali has stated as follows:-

“I am quite innocent and have been falsely implicated in the present case. I had been lifted from GTB Hospital at 5:00 a.m. on 22.10.2009. On the intervening night of 21st and 22nd, October, 2009, I woke up on hearing the noise and noticed that deceased Shama Praveen was crying in burnt condition and my father and sister were trying to

save her by extinguishing the fire and I also tried to save the deceased Shama Praveen. Someone had called PCR, which came and took my father and injured Shama Praveen to GTB Hospital and after that I and my brother, Sarfraz also went to GTB Hospital. At P.S. police obtained my signatures on some blank papers. My brother Sarfraz so many times beaten my sisters Mubin Fatima and Chandkiran. Only Sarfraz along with deceased Shama Praveen used to quarrel with my father on claiming his share in the house, but, my father on always advised them to give the same after getting marriage of my sisters and deceased Shama Praveen after giving false statement got us implicated in the present case.”

114. Mubin Fatima has rendered a similar explanation in the following terms:

“I am quite innocent and have been falsely implicated in the present case. I had been lifted from my house at about 04:30pm on 22.10.2009. On the intervening night of 21st and 22nd, October, 2009, I woke up on hearing the noise and noticed that deceased Shama Praveen crying and the smell of kerosene oil was coming from her body, she was saying that today she would get implicated all of us in the present false case and in the meantime her husband also came but at that time she had put herself on fire. My father tried to save her and in doing so he sustained burn injuries. Someone had called PCR, which came and took my father and injured Shama Praveen to GTB Hospital and after that my brothers – Sarfraz and Zulfikar also went to GTB Hospital. At P.S. police obtained my signatures on some blank papers. My brother Sarfraz so many times beaten me and my sister

Chandkiran. Only Sarfraz along with deceased Shama Praveen used to quarrel with my father on claiming his share in the house, but, my father on always advised them to give the same after getting marriage of my other sisters and deceased Shama Praveen after giving false statement got us implicated in the present case.”

115. It is noteworthy that the defence put suggestions on these terms to the prosecution witnesses.

Available public witnesses not joined in the investigation

116. Learned counsels also submit that despite several public persons being available, admittedly the police made no effort to join them in the investigation or produce them during trial.

117. In this regard, our attention is drawn to the evidence of PW-16 – ASI Sona Ram who has claimed that he made inquiries in the neighbourhood of the spot and interrogated Babu Khan and two other persons whose names he did not remember. These persons had told the police that they had seen the injured Shama Praveen and Gulbeg Ali being taken away by a PCR van to the GTB Hospital. However, PW-16 had not recorded statements of these persons. PW-16 has further stated that public persons had gathered in front of house of the accused persons and had told the police that the incident had occurred on the first floor but the police had not recorded the statements of these public persons. At a later stage in his evidence, PW-16 had stated that he had called public persons from the vicinity including Babu Khan to join the proceedings of sealing and seizing the articles from the spot. He claimed that no

public persons had joined investigations of the case at the spot at the time of sealing and seizing. The investigating officer claims that he made no inquiries from doctors whether Gulbeg Ali had been shifted to some other place or hospital nor he made any effort to record the statement of doctors. PW-16 – ASI Sona Ram has stated that he had reached the spot at around 3:30 am on 22nd October, 2009 and he had inquired about the deceased having been set aflame from Saleem Khan, Smt. Shehnaz and Babu Khan.

118. It is in the testimony of the investigating officer – PW-16 – ASI Sona Ram that Shama Praveen succumbed to the burn injuries on the 23rd of October 2009 and that FIR No.320/2009 was originally registered under Sections 307/34 of the IPC. Section 302 of the IPC was added after the death on 23rd October, 2009. Our attention is drawn to the statements under Section 161 of the CrPC attributed to Sub-Inspector A.S. Yadav (PW-11) and Constable Tarun Kumar (PW-6) as having been recorded on 22nd October, 2009. It is pointed out that the investigating officer has noted that the statements are dated 22nd October, 2009 yet the FIR is stated to be one under Section 302 of the IPC. The submission is that this fact establishes that the prosecution has concocted the case against the accused persons.

119. No finger prints at all have been lifted from the kerosene bottle which would have gone a long way in establishing the culpability of the accused persons.

120. It is in evidence that apart from the three accused persons, one Chand Kiran, another daughter of Gulbeg Ali was residing

with him. The police made no effort to join her in the investigation or to ascertain from her the real facts. No member of the public, which was admittedly present was joined in the investigation.

121. It is urged before us by learned counsel for the respondents that the investigating officer deliberately did not record the statements of these persons because their deposition supported the defence and established their innocence.

Defence evidence ignored

122. It has been bitterly complained by learned counsels appearing for the convicts that the learned trial judge has completely ignored the defence evidence brought on record. Our attention is drawn to the evidence led by the defence. The prosecution has failed to examine these persons from the spot. However, the defence examined two neighbours, namely, Mohd. Usman and Babu Khan who have been referred to by the investigating officer as well.

123. It is in the testimony of DW-1 – Mohd. Usman that he was residing in front of the house of the deceased person on the 21st of October 2009. In the odd hours, he heard noise of the accused persons. When he reached there, the deceased was crying that she would implicate all the family members of the accused persons. The witness stated that he saw the deceased was on fire but he was unable to state as to who has set the deceased aflame. He stated that the eldest son of Gulbeg Ali informed the police. In his cross-examination by the learned APP, the witness stated that he had

heard quarrels between Sarfaraz and accused persons on the issue of property four or five times earlier and he had intervened in the matter earlier as well. The witness stated that Sarfaraz used to demand his share from the house of his father. This witness has explained that Sarfaraz was residing with his family consisting of his wife and two children on the second floor of the house; Gulbeg Ali with Mubin Fatima and his two other daughters were residing on the first floor of the house and the ground floor was occupied by Zulfikar Ali, his wife and his son.

124. DW-1 – Mohd. Usmaan has categorically stated that he had reached the first floor of the house of the accused persons where he had seen that the deceased was aflame. The witness clearly stated that her husband PW-3 - Sarfaraz as well as all the accused persons were also present there.

125. We may also note the testimony of DW-2 - Babu Khan who corroborated the testimony of DW-1 to the effect that there was a subsisting quarrel between Gulbeg Ali and his elder son Sarfaraz on the issue of share in the property. Babu Khan has stated that the deceased used to demand share of her husband from Gulbeg Ali in his property and threatened to implicate her in-laws otherwise. With regard to the incident on 21st October, 2009, the witness stated that he had heard noise at about 3:00 am or 4:00 am from the house of the accused persons and that he along with other mohalla people reached the house of the accused. He saw that the deceased was aflame and the three accused persons and other family members were trying to put off the fire. As per this witness, police

officials came on the calling of Sarfaraz. The witness stated that he had also reached the first floor of the house where the incident had taken place. He corroborated DW-1 – Mohd. Usman's presence at the spot. This witness had also stated that he had heard quarrel about 100 times from the house of the accused persons after the marriage of Sarfaraz who was Gulbeg Ali's elder son; and that there were many complaints between the deceased and the accused persons to the police. The witness denied the statement that Sarfaraz was not present at the spot at the time of the incident.

The defence witnesses establish the presence of Sarfaraz Hussain at the spot at the time of the incident and points towards innocence of the respondents. The defence witnesses also establish motive on the part of Sarfaraz and his deceased wife to falsely implicate the respondents. This material evidence has been ignored.

Testimony of PW-3 – Sarfaraz Hussain, son of Gulbeg Ali and husband of the deceased – Shama Praveen

126. The conduct and testimony of PW-3 – Sarfaraz Hussain makes interesting reading. He was first examined as PW-3 on the 16th of August 2010. Half way through his evidence, the learned APP requested the court to declare him hostile and sought an opportunity to cross-examine this witness. After commencing the cross-examination, his further statement was deferred on the pretext that the case property has not been received from the Forensic Science Laboratory. This witness was thereafter not

examined for a period of almost one year till he was produced on 14th July, 2011 for his further cross-examination by the learned APP. At the end of his cross-examination by the learned APP, suddenly the witness stated that he wanted to volunteer a further statement. He then volunteered a statement which was a complete volte-face in a concerted effort to implicate his father – Gulbeg Ali, brother – Zulfikar Ali and sister – Mubin Fatima in the commission of the offence.

127. In his examination-in-chief on the 16th of August 2010, this witness disclosed that on the 21st of October 2009, he was sleeping in his house. At around 2:00 am, he heard noise of crying which woke him. He found that his children (one son aged about 3 years and daughter aged about 2 years) were sleeping while his wife was missing. PW-3 claimed that he saw his wife on the ground floor having kerosene oil on her body and a bottle of kerosene oil was lying there. The witness categorically stated that his wife was saying that she will kill herself and implicate her whole family. As soon as PW-3 tried to go down to ground floor ‘she put herself on fire’. The witness claims to have put water upon her and that her family members and his younger brother also woke up when she cried. PW-3 also stated that he has made a call to 100 number and PCR van came there and took his wife to GTB Hospital. In his examination-in-chief, the witness corroborated the recovery of articles but claims that they were recovered from the ground floor. When cross-examined by the learned APP after having been declared hostile, the witness denied having made any statement

dated 22nd October, 2006 in connection with the incident to the police under Section 161 Cr.PC. He stated that he had married Shama Praveen against the wish of his parents. The witness admitted that he was having a property dispute with his family members which included a civil case concerning the said dispute. He denied that he was on duty at the time of the incident or that he learnt about it and his wife admission in GTB Hospital later. The witness also denied the suggestion by the learned APP that he had told the police that in the hospital his wife told him that she had been taken away at around 2:30 am by her father-in-law and younger brother to their room or that his brother tied a plastic rope around her neck while his sister – Mubin Fatima held her, his father had poured kerosene oil and threw burning matchstick upon her.

128. On the 14th of July 2011, the learned APP put the articles claimed to have been seized from the spot to the witness. Thereafter the witness stated he wanted to make a further statement and made deposition completely contrary to his statement recorded on 16th August, 2010. The witness deposed that his wife Shama Praveen was beaten by his father - Gulbeg Ali, brother - Zulfikar Ali, sister - Mubin Fatima four to five times before the present incident; that his father was taken to the police lock-up of police station Gokulpuri as his father has beaten his wife. So far as his earlier statement given on 16th August, 2010 is concerned, PW-3 – Sarfaraz stated that he had made the deposition on tutoring by the previous counsel of the accused person and that he had written on a

paper (Ex.PW3/B) the dictation by the previous counsel of accused persons of such deposition.

129. This witness now claimed that on 22nd October, 2009, he was informed about his employer Sher Ali about the incident at 2:45 am when he was present on his job place in Gonda Chowk, Delhi and that he had rushed to the GTB Hospital and met his wife. The witness claimed that his wife had told him that the three accused persons had put pressure on him not to go to Seelampur Court as the matter was fixed for evidence there. This witness for the first time stated that the wife told him that Zulfikar had tied her neck; Mubin Fatima had caught hold her hands; and Gulbeg Ali sprinkled kerosene and ablaze her.

130. The witness gives no time of his visit to the hospital. None of the other witnesses mention the presence of PW-3 at the GTB Hospital. If the deceased had actually made such a statement to PW-3, then the same would have been on police record. It would have been the basis of recording the FIR. It is not so.

131. It is in the evidence of PW-3 – Sarfaraz that his sister Chand Kiran had lodged a complaint against him under Sections 107/151 of the CrPC on allegations of his beating her. PW-3 stated that he had not beaten her but merely had “warned her not to meet his brother-in-law, Tahir who was in JC during that period”. PW-3 has further stated that he was lodged in jail on the aforesaid complaint under Sections 107/151 of Cr.PC. The witness Sarfaraz further admitted the suggestion that he had beaten his sister Mubin Fatima

in the year 2009 on the accusation that she had beaten his wife Shama Praveen 10 to 12 days before the present case.

132. It is also in the testimony of PW-3 – Sarfaraz that he was having some property dispute with his family members which included a civil case concerning the said dispute.

133. PW-3 has referred to a case pending in the Seelampur Court details whereof having not been disclosed.

134. PW-3 – Sarfaraz has denied the suggestion that House No.B-22, Gali No.3, Chaman Park, Delhi was not sold out at the time of the statement. The witness admitted that the said property was owned by his father. He later volunteered that the transaction regarding the sale and purchase of the said house was completed between his father Gulbeg Ali and one Sher Ali. The witness claimed that he had received an amount of Rs.1,90,000/- as his share in the sale consideration.

135. Mr. Ajay Verma, learned counsel further contended that PW-3 – Sarfaraz, husband of the deceased has not spoken the truth on 14th July, 2011 before this court. It is urged that the statement of this witness that he testified on the lines suggested by an advocate of the accused persons is absolutely false.

136. Learned counsels for the appellants have strongly urged that PW-3 – Sarfaraz gave the true version of the occurrence in his deposition on 16th August, 2010 when he stated that the deceased had herself alight in a self-immolation bid with the intention of falsely implicating her in-laws for the same. It is urged that he turned turtle because of the dispute regarding sale of the property.

137. PW-3 has attempted to claim that the house was sold on 22nd June, 2010 and that he had received this amount on 23rd October, 2010. This fact is disputed by the accused persons.

138. Gulbeg Ali in the statement under Section 313 of the CrPC has explained that he has been falsely implicated in the case and arrested. He has further stated after the present case, since Gulbeg Ali was in judicial custody, his son along with his wife Smt. Shahnaz has taken his household goods and has sold his house.

139. We are informed by learned counsel for Gulbeg Ali that Gulbeg Ali filed an application under Section 156(3) of the Cr.PC resulting in the passing of an order dated 30th January, 2012 by the Metropolitan Magistrate directing registration of FIR against Sarfaraz. We are further informed that FIR No.36/2012 was registered on 5th February, 2012 against Sarfaraz under Sections 420/34 of the IPC.

140. The above narration would show that having taken the amount after selling the property, PW-3 – Sarfaraz completely turned around on 14th July, 2011 and made the deposition against his father, brother and sister.

141. Interestingly, the witness attributes neither threat nor fear or undue influence of any kind by the previous counsel for testifying on given lines on 16th August, 2010. On the contrary, it is a case of the witness – PW-3 that he was inimical to the accused persons; that there was several complaints and cross-complaints between them including proceedings under Sections 307/151 of the Code of Criminal Procedure and even a civil case pending. It is implausible

to say the least that such being the state of affairs between the sides, PW-3 could have been persuaded by any person, let alone the respondents or their lawyer, out of goodness of his heart or love and affection for his father, brother or sister to make the first statement which he did on oath in court.

142. PW-3 - Sarfaraz has made a false statement that he received information of the incident at 2:45 am. There is affirmative evidence that the incident took place at around 3:00 am.

143. It is also noteworthy that PW-16 - ASI Sona Ram has stated that he met the husband of the deceased Shama Praveen on the spot in the early hours of morning. PW-3 – Sarfaraz in his statement on 16th August, 2010 has also admitted his presence in the house at the time of the incident. The same is corroborated by several other pieces of evidence. Recoveries were effected in his presence from the spot in the early hours. Both DW-1 – Mohd. Usman and DW-2 – Babu Khan have stated that Sarfaraz was present at the spot. These statements would support the presence of Sarfaraz at the spot at the time of incident and laying credence to the testimony given by him on 16th August, 2010 as the truthful account of what transpired. The same is also supported by the evidence of the photographs which show that two sleeping children were present in the room. It is noteworthy that PW-3 claimed to be engaged in the work of nickel plating. It is urged that such work is taken during the day hours.

144. We are persuaded to accept the submissions of learned counsels for the respondents. In this regard, we find that PW-3 –

Sarfaraz had originally testified on 16th August, 2010. He thereafter kept quiet for a period of almost one year till his further examination was conducted on 14th July, 2011. Sarfaraz has placed on record with regard to other complaints and litigations between him and his father, brother and sister. Therefore, he is not a person who did not have legal assistance or did not know court proceedings. Before the trial court, PW-3 had the assistance of the police as well as the prosecutor. His very silence till 14th July, 2011 would show that his testimony to the effect that he had given an incorrect statement in his deposition on 16th August, 2010 at the instance of an advocate for the accused persons is unreliable and unworthy of any credence.

145. So far as PW-14 – HC Ravi Shankar Sharma is concerned, a perusal of his cross-examination would show that he has made considerable improvements in his prior statements under Section 161 of the Cr.PC by the investigating officer. He was repeatedly confronted with different portions of court testimony vis-à-vis statement under Section 161 of the Cr.PC (Ex.PWD/A). The witness had not made any disclosures in Ex.PWD/A. The omissions include the important circumstances as to the alleged declaration made by the deceased implicating her father-in-law, brother-in-law and sister-in-law for the commission of offence and other important facts which were stated by him in court. Mr. Ajay Verma, learned counsel for Mubin Fatima has drawn our attention to the fact that his statement under Section 161 of the Cr.PC (Ex.PWD/A) also makes a reference to Section 302 of IPC and it is

contended that clearly the statement was recorded after the deceased had died.

146. We may note that PW-14 has proved the Police Control Form – Ex.PW13/A which contains four statements attributed to the deceased. The first two are telephone calls received at 3:07:43 hrs. The second report at 3:27:57 hrs is after the police reached the spot refers to a self immolation bid by a lady. It is only after the deceased had been admitted to GTB Hospital that at 4:27 am, the allegation of burning surfaces for the first time. Such allegation is also unsupported by any evidence of fitness of the deceased or any other witnesses to the statement. The three prior statements are supported by the other evidence on record.

147. There are several gaps in the case of the prosecution as noticed above. One material factor established from the record of the police control room is a fact that the deceased made a telephone call at 3:00 am to the police control room complaining of a quarrel at the premises. She made another phone call to the police within three minutes thereafter, barely about two minutes before the police reached there. The prosecution has set up a case that three grown up adults were involved in the incident and were pitched against one lady, i.e., the deceased. How would three persons bent upon burning a lady to death, permit her to use her telephone to call the police, not once but twice over? This story is implausible to say the least.

148. Learned counsels for the respondents have suggested that the unfortunate incident was a result of bad planning at the instance of

the deceased and her husband Sarfaraz who had set up a facade of her being burnt at the hands of the respondents so as to falsely implicate them in a criminal case because of the motive of grabbing the immovable property owned by Gulbeg Ali. It is submitted that for this reason, the deceased appears to have made the first phone call to the police to seek the police action before pouring kerosene over herself as is manifested from the statement made by PW-3 – Sarfaraz on the 16th of August 2010 in court. She confirmed that police was underway by the second telephone call before setting herself alight. Learned counsel for the respondents have suggested that the deceased least expected that she would suffer burns of the nature or extent which would take her life in this incident.

149. Learned counsel for the respondents have also vehemently urged that the investigation in the instant case is shoddy and the prosecution has failed to gather vital information and evidence which would have established the innocence of the respondents. It is contended that the prosecution failed to prove the call details of telephone no.9312668396 and failed to produce the doctor who had recorded the MLC. It is contended that the treatment chart of the deceased was also not produced which would have established that she had been administered sedatives and was not in a fit condition to make any statement.

Motive and intention

150. So far as motive is concerned, it has been vehemently contended by Ms. Ritu Gauba, learned APP for the State that the respondents had motive to kill the deceased for the reason that she had married Sarfaraz son of Gulbeg Ali against their will. This motive however was not the case of the prosecution before the learned trial judge. We may also notice that the marriage appears to be more than four years old. Furthermore documentary evidence was led with regard to the palpable animosity nursed by PW-3 – Sarfaraz and the deceased against Gulbeg Ali and the other family members on account of property dispute.

151. The prosecution attempted to establish the property dispute as the motive for killing the deceased. The trial judge accepted this suggestion. However, in drawing this conclusion, a material factor has been completely lost sight of. The property was owned by Gulbeg Ali. It was Sarfaraz, husband of the deceased who was seeking his share therein. Mubin Fatima or Zulfikar Ali, the other children of Gulbeg Ali were placed similarly as Sarfaraz. Shama Praveen had no right or claim in or against the said property. If the property dispute was the motive being nursed by the accused persons, then killing Shama Praveen achieved no purpose at all inasmuch as the claim of Sarfaraz would have survived and subsisted. On the contrary, the evidence on record supports the defence to the effect that the deceased had set herself aflame with the intention of falsely implicating her father-in-law and his other

children with the intent to grab the property. Unfortunately, the plan misfired and she suffered burns which led to her death.

152. Learned APP for the State has tried to suggest that Shama Praveen (deceased) was married to PW-3 – Sarfaraz against the wishes of the accused persons for which reason as well they had put her on fire. This was not the case of the prosecution before the trial court. Such a case was not even put to the accused persons.

Conclusion

153. It is well settled that dying declaration is a substantive piece of evidence which can be relied on, provided it is established that the same was made voluntarily and truthfully by a person who was in a fit state of mind. If so made, conviction can be based on the dying declaration. Medical evidence and surrounding circumstances cannot be ignored and kept out of consideration by the court placing exclusive reliance upon the testimony of a person recording the dying declaration.

154. In the instant case, if the statements attributed to the deceased are kept aside, there is no evidence at all to support the case of the prosecution. There is no reliable evidence at all to establish that the deceased was in a fit state of mind at the time of making the statements attributed to her. Furthermore, the respondents have examined witnesses in their defence who have cast considerable doubt on the correctness of the case sought to be established by the prosecution.

155. The unfolding of the evidence or the offence as suggested by the prosecution are not supported by the spot inspection; the site plan proved by the prosecution on record. The entire incident is falsified by the photographs which have been taken by the police at the spot very shortly after the alleged incident.

156. We have also noticed above that the prosecution has failed to produce the members of the public who were available at the spot when the incident took place. The doctors who examined the deceased have not been examined.

157. It is settled law that if there is some material on record which is consistent with the innocence of the accused which may be reasonably true, even though it is not positively proved to be true, the accused would be entitled to acquittal. In *(1973) 2 SCC 793 Shivaji Sahabrao Bobade vs. State of Maharashtra*, the Supreme Court had stated that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

Sentencing

158. Before parting with the case, it is essential to notice and comment on the manner in which the learned trial court has proceeded in passing the order on sentence. Our attention has been drawn to para 129 of the judgment dated 17th March, 2012 wherein the trial court has observed as follows:-

“129. Since it has been established that death of deceased, helpless Shama Praveen had been caused by

extreme brutal act of accused persons while setting the deceased under fire just to crush her voice for demanding her rights. It is very shameful for a society where woman including girls have been victimizing either inside or outside the four walls of house which cannot be permitted or allowed for anyone to cause death of any person in such a cruel manner. Woman must be respected everywhere. **“Jahan istri ka samman hota hai waha devta vaas karte hai”**.

159. It has therefore been observed in para 130 that a dying declaration enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim.

160. Thereafter while recording an order on sentence dated 26th March, 2010, the learned trial court has noted the following factors:-

- (i) Kumari Mubin Fatima is a young lady.
- (ii) Zulfikar Ali is aged about 26 years at that time and was having a responsibility of his wife and a minor child.
- (iii) The convict Gulbeg Ali is an old age man.
- (iv) All the convicts belong to a poor family.
- (v) The convicts were not having previous convictions and had crystal clear antecedents.

161. The order on sentence of death is premised on the learned judges' view that convicts were involved in a murder of helpless woman committed in an extreme brutal manner which stood established by the dying declaration of the deceased. So far as the motive was concerned, reference was made to litigation between

the deceased and accused person over the property. The brutality of the crime was concluded from the ‘way of killing’. The learned trial judge has observed that ‘pain and suffering of the deceased while burning could be felt’. It was further observed that the accused persons had been the ‘caretaker of the deceased and they must have some alternative way to resolve the dispute in the family and in order to crush the voice of the deceased with the common intention set the deceased on fire’.

162. The learned trial judge simply observed that the mitigating circumstances for sentencing the accused persons are not sufficient to consider for lenient view and that ‘faith of caretaker will be lost and if the court keeps silence without any action then system of justice delivery would be collapsed and that the brutal act of the accused persons comes under the category of ‘rarest of rare cases’. We may observe that the judge has noticed the pronouncement of the Supreme Court reported at (1980) 2 SCC 684, Bachan Singh v. State of Punjab as well as (1983) 3 SCC 470, Machhi Singh v. State of Punjab.

163. So far as the sentencing is concerned, we may refer to the discussion by the Supreme Court in a recent judgment reported at (2012) 11 SCALE 140, Sangeet & Anr. v. State of Haryana wherein the court considered the entire gamut of judicial pronouncements on the award of death sentences as well as the sentencing policy and inter alia concluded as follows:-

“80. The broad result of our discussion is that a relook is needed at some conclusions that have been taken for

granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court. To be more specific, we conclude:

1. This Court has not endorsed the approach of aggravating and mitigating circumstances in *Bachan Singh*. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.
2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.
3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.
4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes.

5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.

6. Remission can be granted Under Section 432 of the Code of Criminal Procedure in the case of a definite term of sentence. The power under this Section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power Under Section 432 of the Code of Criminal Procedure can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.

7. Before actually exercising the power of remission Under Section 432 of the Code of Criminal Procedure the appropriate Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner.

81. Given these conclusions, we are of the opinion that in cases such as the present, there is considerable uncertainty on the punishment to be awarded in capital offences-whether it should be life imprisonment or death sentence. In our opinion, due to this uncertainty,

awarding a sentence of life imprisonment, in cases such as the present is not unquestionably foreclosed. More so when, in this case, there is no evidence (contrary to the conclusion of the High Court) that Seema's body was burnt by Sandeep from below the waist with a view to destroy evidence of her having been subjected to sexual harassment and rape. There is also no evidence (again contrary to the conclusion of the High Court) that Narender was a professional killer.”

164. On the same aspect, reference requires to be made to another pronouncement of the Supreme Court reported at (2012) 12 SCALE 112, Oma @ Omprakash & Anr. v. State of Tamil Nadu. In this judgment, the Supreme Court noticed certain prior judicial pronouncements in the following terms:-

“50. In *Lehna v. State of Haryana* : (2002) 3 SCC 76 a three-Judge Bench, after referring to the pronouncements in *Bachan Singh* (supra) and *Machhi Singh* (supra), ruled under what circumstances the collective conscience of the community is likely to be shocked. We may fruitfully quote a passage from the same:

“A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. *Award of punishment following conviction at a trial in a system wedded to the rule*

of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.

The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, *for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.*”

(Emphasis added)

165. On the manner in which, the learned trial judge must proceed, the Supreme Court observed as follows:-

“56. In *Hindustan Times Ltd. v. Union of India and Ors.* : (1998) 2 SCC 242, a two-Judge Bench of this Court referred to an article *On Writing judgments*, by Justice Michael Kirby of Australia (1990) 64 ALJ 691) wherein it has been highlighted, apart from any facet that the legal profession is entitled to have, it demonstrated that the Judge has the correct principles in

mind, has properly applied them and is entitled to examine the body of the judgment for the learning and precedent that they provide and further reassurance of the quality of the judiciary which is the centre-piece of our administration of justice. Thus, the fundamental requirement is that a Judge presiding over a criminal trial has the sacrosanct duty to demonstrate that he applies the correct principles of law to the facts regard being had to the precedents in the field. A Judge trying a criminal case has a sacred duty to appreciate the evidence in a seemly manner and is not to be governed by any kind of individual philosophy, abstract concepts, conjectures and surmises and should never be influenced by some observations or speeches made in certain quarters of the society but not in binding judicial precedents. He should entirely ostracise prejudice and bias. The bias need not be personal but may be an opinionated bias.”

166. Unfortunately, in the case in hand, the learned trial judge has completely misdirected itself in convicting the appellants as well as the order on sentence.

167. We may also notice a pronouncement of the Supreme Court reported at (2012) 12 SCALE 407, Sandesh @ Sainath Kailash Abhang v. State of Maharashtra wherein the court has noticed the judgment of Sangeet & Anr. (supra). So far as the circumstances which are required to weigh with the court while awarding the death penalty is concerned, the principles laid down in this judgment in para 24 read as follows:-

“24. We have already noticed that it is not possible to lay down as a principle of law as to in which cases the death penalty should or should not be imposed. The above

judgments are on their own facts, but one aspect that certainly is stated in these judgments is the possibility of the accused being reformed, he being young and having no criminal involvement in similar crimes are relevant considerations. In the present case the prosecution had led no evidence to show that the Appellant was a hardened criminal and there was no possibility of his being reformed. There is also no evidence to show that during the time when he was in jail, his conduct was unworthy of any concession. It is a heinous and brutal crime that the accused has committed, but other relevant considerations outweigh it for the Court to state that the present case is one that of rarest of the rarest of rare cases.”

168. In the case in hand, no evaluation of the aggravating and mitigating circumstances effected. The learned trial judge has not even considered the aspect of possibility of reformation of the appellants while awarding the death penalty to the appellants.

169. In view of the above discussion, we have no hesitation in holding that the impugned judgment dated 17th March, 2012 and order on sentence dated 26th March, 2012 are not sustainable in law. The same are hereby set aside and quashed. The respondents in Death Reference No.2/2012 who are appellants in CrI.A.Nos.472/2012, 473/2012 and 474/2012 are hereby directed to

be set at liberty forthwith. The death reference is answered and the CrI.A.Nos.472/2012, 473/2012 and 474/2012 are allowed in the above terms.

GITA MITTAL, J

J.R. MIDHA, J

JANUARY 29, 2013

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